and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of one thousand seven hundred dollars ($1700.00) of the moneys and funds of the said banking association, and the same James J. Henehan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of one thousand seven hundred dollars, as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 3.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, to-wit, on or about the 13th day of June, in the year of Our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association; organized and existing under and by virtue of the laws of the said United States, to wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association

and any agent appointed to examine the affairs of the said banking association, and with intent to defraud and injure said banking association, make a certain false entry in a certain report and statement of the said banking association, said report and statement being a debit slip and the original entry of the matters thereon contained, and being then and there used for the purpose of entering upon the general ledger of said banking association the matters thereon contained, which said false entry was false in this, to-wit, that upon said debit slip the said James J. Henehan then and there entered the words and figures, "Mut. Cy. a/c $11500.00," meaning and intending to convey to the officers and bookkeepers of said banking association that the sum of eleven thousand five hundred dollars ($11,500.00) in mutilated currency had been by the said James J. Henehan shipped to the Treasurer of the United States, and that said amount of eleven thousand five hundred dollars ($11,500.00) should be charged on the general ledger of said banking association against the mutilated currency account; whereas, in truth and in fact, the said James J. Henehan had shipped the sum of eight thousand five hundred dollars ($8,500.00) only in mutilated currency to the Treasurer of the United States, and that said debit slip was false in the amount of money written thereon; he, the said James J. Henehan, intending thereby then and there, at the time and place of so making said false entry, to injure and defraud the said Second National Bank and to deceive the officers of said banking association and any agent appointed to examine the affairs of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 4.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, towit, on or about July 20th, in the year of Our Lord one thousand nine hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association and any agent appointed to examine the affairs of said banking association, and with intent to defraud and injure said banking association, make a certain false entry on the paying teller's daily cash sheet for cage number twelve (12) of the said banking association, for the said 20th day of July, in the year of our Lord nineteen hundred and fourteen, in this, to-wit: that among the entries of currency upon said sheet he added the sum of four thousand seven hundred dollars ($4,700.00) to the various other amounts of currency and coin entered upon said sheet, whereas in truth and in fact, the said sum of four thousand seven hundred dollars ($4,700.00) so entered and reported was four thousand seven hundred dollars ($4,700.00) in excess of the true amount of money which should have appeared upon said sheet and which was then and there in his possession as assistant cashier and head paying teller in charge of cage

number twelve (12) of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

JOHN S. PRATT,
Assistant United States Attorney.

(Endorsement): No. 1558. District Court of the United States for the Western Division of the Northern District of Ohio. The United States *vs.* James J. Henahan. Indictment for embezzlement and making false entries on national banking association records. Sec. 5209, R. S. A true bill, Will F. Broer, Foreman of Grand Jury. Filed Mar. 5, 1915, at o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O. John S. Pratt, Asst. U. S. District Attorney.

October Term, A. D. 1914, to wit: March 15, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs
JAMES J. HENAHAN. } Criminal. No. 1558.

This day came the United States Attorney on behalf of the United States and came also the defendant accompanied by counsel, and being arraigned, and waiving the reading of the indictment herein, he for plea thereto says he is guilty as he is therein and thereby charged.

And the Court having inquired of the defendant if he had anything to say why sentence should not be pronounced upon him, and having received his reply thereto,

It is thereupon ordered that said defendant be imprisoned in the penitentiary at Leavenworth, Kansas, for a period of five (5) years, and that he pay the costs of this prosecution taxed at $———.

October Term, A. D. 1914, to wit: March 15, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs
JAMES J. HENAHAN. } Criminal. No. 1558.

The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

IN THE DISTRICT COURT OF THE UNITED STATES NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Motion.

Now comes the United States by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the Court to vacate the order of the

court heretofore entered herein, wherein the court attempts to suspend the execution of the sentence of imprisonment imposed upon the defendant James J. Henahan, for the following reasons, to-wit:

1. That the said suspension was not for the purpose of preventing an abuse of the court's process or to prevent an injustice being done the defendant;

2. That the court had no authority or jurisdiction to enter said order of suspension;

3. That said order of suspension was and is illegal and void;

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(Endorsement:) No. 1558. In the District Court of U. S. Northern District of Ohio, Western Division. The United States *vs* James J. Henahan. Motion. E. S. Wertz, United States Attorney, J. S. Pratt, Assistant U. S. Attorney. Filed Mar. 25, 1915. At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

October Term, A. D. 1914, to-wit: April 9, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

The UNITED STATES
vs.
JAMES J. HENAHAN. } Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, to vacate the order of the court suspending the execution of the sentence imposed upon the defendant.

The court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final, except such as might arise under said order of suspension, and the said motion having been argued by counsel and submitted to the court, and the court now being fully advised in the premises finds that said motion is not well taken and should be overruled, for facts and reasons which the Court sets out in the opinion filed herewith.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling the said motion, the United States Attorney in behalf of the United States excepts.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Præcipe.

To the clerk of the above entitled court:

You will please prepare and issue forthwith an order of commitment for James J. Henahan, in accordance with the judgment of the court heretofore entered by the Honorable John M. Killits, Judge of this court, in the above entitled cause, by which judgment the defendant, James J. Henahan was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas, said order of commitment to be prepared as required by law and the rules of this court.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.

(Endorsement:) No. 1558. In the District Court of U. S. Northern District of Ohio, Western Division. The United States vs. James J. Henahan. Præcipe. Filed Apr. 9, 1915, At o'clock M. B. C. Miller, Clerk, U. S. District Court N. D. O. E. S. Wertz, United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES *vs* JAMES J. HENAHAN. } Refusal of clerk to issue order of commitment.

To E. S. WERTZ,
United States Attorney for the Northern District of Ohio:

I hereby refuse to issue order of commitment for James J. Henahan in the above entitled cause, as requested by you in your præcipe filed herein, for the reason that the sentence pronounced by the Honorable John M. Killits, Judge of this court, by the terms of which the said James J. Henahan was sentenced to five years imprisonment in the penitentiary at Leavenworth, Kansas, has been suspended by the terms of the following order made in the above entitled cause:

The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

B. C. MILLER,
Clerk U. S. District Court,
By J. W. WILSON,
Deputy Clerk.

APR. 9, 1915.

(Endorsement:) No. 1558. In the District Court of U. S., Northern District of Ohio, Western division. The United States *vs* James J. Henahan. Copy of Refusal Clerk to issue order of Commitment. Filed Apr. 9, 1915. At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Motion.

Now comes the United States, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the court for execution of the judgment rendered against the defendant James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of Five (5) years in the penitentiary at Leavenworth, Kansas, and for an order directing the clerk of this court to forthwith issue commitment upon the said judgment and sentence for the reasons towit:

1. That the order of the court entered subsequently to the entry of judgment whereby the court attempted to suspend the execution of said judgment was and is illegal and void;

2. That the court has no authority or jurisdiction to enter said order of suspension.

3. That the said suspension was not for the purpose of preventing an abuse of the Court's process or to prevent an injustice being done the said defendant;

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order, was necessary, before the said judgment should become final.

5. That the clerk because of said suspension order has refused and will continue to refuse, to comply with the praecipe filed in his office in said cause on behalf of the United States calling for the issuance forthwith of said commitment.

E. S. WERTZ,
United States Attorney,
JOHN S. PRATT,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(Endorsement:) No. 1558. In the District Court of U. S. Northern District of Ohio, Western Division. The United States *vs* James J. Henahan. Motion. E. S. Wertz, United States Attorney, J. S. Pratt, Assistant U. S. Attorney. Filed Apr. 9, 1915, At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

October Term, A. D. 1914, to-wit: April 9, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs
JAMES J. HENAHAN.
} Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, for execution of the judgment rendered against the defendant,

James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas. The Court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order, was necessary, before the said judgment should become final, except such as might arise under said order of suspension, and that the clerk, because of said suspension order has refused, and will continue to refuse to comply with the praecipe filed in his office in this cause, in behalf of the United States, calling for the issuance forthwith of said commitment, and the said motion having been argued by counsel and submitted to the court, and the court being now fully advised in the premises finds that when the order suspending the execution of the sentence of imprisonment was made, there were no proceedings pending for a review of the said judgment, and there was nothing necessary requiring further action by the court making the order before the said judgment should become final, except such as might arise under said order of suspension.

The court further finds that the United States, Plaintiff, through its attorney, E. S. Wertz, has filed in the office of the Clerk of this court, a praecipe requiring said clerk to prepare and issue forthwith an order of commitment as required by law and under the rules of this court, and the court further finds that the said Clerk of this Court, because of the suspension order made by this Court, has refused, and will continue to refuse to comply with the said praecipe filed in his office in said cause in behalf of

the United States, calling for the issuance forthwith of said commitment.

The court further finds because of the findings of the court in an opinion herewith filed, that the said motion is not well taken and should be overruled.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling said motion the United States Attorney in behalf of the United States excepts.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

UNITED STATES
vs.
JAMES J. HENAHAN.

KILLITS, J.:

The district attorney, by motion, asks the court to vacate an order made at this term suspending the execution of the sentence of imprisonment imposed upon the defendant.

It is proper that the court at this time should state its reasons, first, for attempting to suspend the execution of the sentence of imprisonment, and for now refusing the motion to vacate such order.

We find that for a great many years judges of this court have exercised, without question, the discretion both to suspend the execution of sentence already imposed, or to pass a criminal case after conviction indefinitely, at the discretion of the court, for sentence. The action of the court in this case was no innovation in a well recognized practice, not only in

the federal courts of Ohio, but, sustained by specific opinion of the Supreme Court of Ohio as applied to the discretionary power of the state court.

Without enlarging by reference to authority upon the right of the court to suspend the execution of sentence, we observe that there seems to be no question but that such discretion abided in common law courts in England and America at the time of the adoption of the Federal Constitution. Our criminal practice conforms to the common law practice obtaining in 1787, so far as it has not been changed by specific statutory provisions. No attempt by Congress has been made to change the relation of the court to this proposition, as it existed when the Constitution was adopted. Some anachronisms still remain to distinguish our criminal procedure from that of the States, due to the fact that the common law of the eighteenth century still controls us. For examples, a wife may not testify, nor is a convicted man competent as a witness.

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.

It seems to the court that no person is better able to determine just what proportionate effect should be given to each of these three elements now entering into the passing of a judgment upon conviction than

the judge who has observed the defendant, has given some consideration to the effect of arrest and conviction upon his character, knows his domestic and social surroundings, and the community in which his crime was committed. We have become impressed with the thought that no discretionary power more valuable than this is held by the judge of a court of this jurisdiction, and our experience in its exercise but convinces the court of its value to society as well as to the individual who benefits by it.

Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent "an abuse of the court's process, or to prevent an injustice being done to the defendant" so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed. We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character and habits have so strongly commended him to his friends, acquaintances and per-

sons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him. These people are law abiding citizens with as keen a desire to uphold and vindicate the law as any other citizens of the community.

All the surroundings of the defendant, including what we were able to judge of his disposition and purposes, impressed the court with the feeling that it were much better for him, as a component of society, to remain at large under the court's parole in an attempt to rehabilitate himself, than to send him into the term of imprisonment which the law provided, and which, if served, might very readily tend to diminish his usefulness to society.

If his case is to be used, as of course it may be used with the utmost propriety, as a test of the question whether a discretion of this sort abides with the court, we wish it to be understood that in the court's opinion, after a full study of all the circumstances surrounding the case, the defendant is fully worthy of the exercise of the discretion, should the court's power in the premises be sustained.

The court's judgment in this matter is supported by that of substantial citizens who recommend a pardon to the young man, with an application in that behalf pending.

JOHN M. KILLITS, *Judge.*

(Endorsement:) No. 1558. United States District Court, Northern District of Ohio, Western Division. United States *vs.* James J. Henahan. Original. Opinion. Filed Apr. 9, 1915, At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

October Term, A. D. 1914, to-wit: April 22, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Criminal. No. 1558.

This day came the United States Attorney and presented to the Court the Bill of Exceptions of the United States and prayed that the same be allowed, signed and made a part of the record herein, and the said Bill of Exceptions having been examined by the Court, it is found to be in all respects true and correct and same is hereby settled and allowed, and made a part of the record in this cause.

THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.

I, B. C. Miller, Clerk of the District Court of the United States for the Division and District aforesaid, do hereby certify that the annexed and foregoing is a true and complete copy of the Indictment filed March 5, 1915; Order of sentence, and Order suspending sentence, entered March 15, 1915; Motion to vacate order suspending sentence, filed March 25, 1915; Order overruling motion to vacate order of suspension, entered April 9, 1915; Refusal of Clerk to issue order of commitment, filed April 9, 1915; Motion for execution of judgment, filed April 9, 1915; Order overruling motion for execution of judgment, entered April 9, 1915; Opinion, filed April 9, 1915, and order allowing Bill of Exceptions, entered April 22, 1915, in the therein entitled cause, on the dates aforesaid.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 23rd day of April, A. D. 1915, and in the 139th year of the Independence of the United States of America.

B. C. MILLER, *Clerk*,

(SEAL) By J. W. WILSON,

Deputy Clerk.

EXHIBIT "B"

Bill of exceptions.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES OF AMERICA,
vs
JAMES J. HENAHAN, Defendant. } Criminal No. 1558.

BILL OF EXCEPTIONS.

Appearances:

For the Government: Edwin S. Wertz, Esq., United States Attorney, John S. Pratt, Esq., Assistant United States Attorney.

For the Defendant: E. J. Marshall, Esq.

Be it remembered, That in the above entitled cause in this court the following proceedings were had at the October, 1914, term of this court, to-wit:

On the 5th day of March, 1915, an indictment was returned into court by the grand jurors, in the words and figures following, to-wit:

INDICTMENT.

THE UNITED STATES OF AMERICA NORTHERN DISTRICT OF OHIO WESTERN DIVISION. Ss. } No. 1558. Criminal.

In the District Court of the United States, within and for the Division and District aforesaid.

At the October Term of said Court, in the year of Our Lord one thousand nine hundred and fourteen.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within and for the body of the Western Division of the Northern District of Ohio, upon their oath present and find that

Sec. 5209 R. S.] JAMES J. HENAHAN,

late of the Division and District aforesaid, heretofore, to-wit, on or about the 13th day of June, in the year of our Lord one thousand nine hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo, did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of three thousand dollars ($3,000.00) of the moneys and funds of the said banking association, and the said James J. Henahan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of three thousand dollars ($3,000.00) as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 2.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, to-wit, on or about the 20th day of July, in the year of Our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit: the Second National Bank of Toledo, did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of one thousand seven hundred dollars ($1700.00) of the moneys and funds of the said banking association, and the same James J. Henehan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of one thousand seven hundred dollars, as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 3.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

Sec. 5209 R. S.] JAMES J. HENEHAN

heretofore, towit, on or about the 13th day of June, in the year of our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association and any agent appointed to examine the affairs of the said banking association, and with intent to defraud and injure said banking association, make a certain false entry in a certain report and statement of the said banking association, said report and statement being a debit slip and the original entry of the matters thereon contained, and being then and there used for the purpose of entering upon the general ledger of said banking association the matters thereon contained, which said false entry was false in this, towit, that upon said debit slip the said James J. Henehan then and there entered the words and figures, "Mut. cy. a/c $11500.00," meaning and intending to convey to the officers and bookkeepers of said banking association that the sum of eleven thousand five hundred dollars ($11,500.00) in mutilated currency had been by the said James J. Henehan shipped to the Treasurer of the United States,

and that said amount of eleven thousand five hundred dollars ($11,500.00) should be charged on the general ledger of said banking association against the mutilated currency account; whereas, in truth and in fact, the said James J. Henehan had shipped the sum of eight thousand five hundred dollars ($8,500.00) only in mutilated currency to the Treasurer of the United States, and that said debit slip was false in the amount of money written thereon; he, the said James J. Henehan, intending thereby then and there, at the time and place of so making said false entry, to injure and defraud the said Second National Bank and to deceive the officers of said banking association and any agent appointed to examine the affairs of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 4.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, towit, on or about July 20th, in the year of Our Lord one thousand nine hundred and fourteen, at Toledo in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association and any

agent appointed to examine the affairs of said banking association, and with intent to defraud and injure said banking association, make a certain false entry on the paying teller's daily cash sheet for cage number twelve (12) of the said banking association, for the said 20th day of July, in the year of Our Lord nineteen hundred and fourteen, in this, to wit, that among the entries of currency upon said sheet he added the sum of four thousand seven hundred dollars ($4,700.00) to the various other amounts of currency and coin entered upon said sheet, whereas, in truth and in fact the said sum of four thousand seven hundred dollars ($4,700) so entered and reported was four thousand seven hundred dollars ($4,700.00) in excess of the true amount of money which should have appeared upon said sheet and which was then and there in his possession as assistant cashier and head paying teller in charge of cage number twelve (12) of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

JOHN S. PRATT,
Asst. United States Atty.

(Endorsement:) No. 1558. District Court of the United States for the Western Division of the Northern District of Ohio. The United States *vs.* James J. Henehan. Indictment for embezzlement and making false entries on national banking association records. Sec. 5209 R. S. A True Bill, Will F. Broer, Foreman of Grand Jury. Filed Mar. 5, 1915, at o'clock M B. C. Miller, Clerk U. S. District Court, N. D. O. John S. Pratt, Asst. U. S. District Attorney.

On the 15th day of March, 1915, the following proceedings were had in said cause, as appears by the journal of the court, to-wit:

THE UNITED STATES,
vs.
JAMES J. HENEHAN. } Criminal. No. 1558.

This day came the United States Attorney on behalf of the United States, and came also the defendant accompanied by counsel, and being arraigned, and waiving the reading of the indictment herein, he for plea thereto says he is guilty as he is therein and thereby charged.

And the Court having inquired of the defendant if he had anything to say why sentence should not be pronounced upon him, and having received his reply thereto,

It is thereupon ordered that said defendant be imprisoned in the penitentiary at Leavenworth, Kansas, for a period of five (5) years, and that he pay the costs of this prosecution taxed at $———.

THE UNITED STATES,
vs.
JAMES J. HENEHAN. } Criminal. No. 1558.

The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

On the 25th day of March, 1915, there was filed in this cause a motion by the United States as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN } Motion.

Now comes the United States, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the Court to vacate the order of the court heretofore entered herein, wherein the court attempts to suspend the execution of the sentence of imprisonment imposed upon the defendant James J. Henahan, for the following reasons, towit:

1. That the said suspension was not for the purpose of preventing an abuse of the court's process or to prevent an injustice being done the defendant;

2. That the court had no authority or jurisdiction to enter said order of suspension;

3. That said order of suspension was and is illegal and void;

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

On the 9th day of April, 1915, the following proceedings were had in said cause, as appears by the journal of the court, to-wit:

THE UNITED STATES,
vs
JAMES J. HENAHAN.
} Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, to vacate the order of the court suspending the execution of the sentence imposed upon the defendant.

The court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final, except such as might arise under said order of suspension, and the said motion having been argued by counsel and submitted to the court, and the court now being fully advised in the premises finds that said motion is not well taken and should be overruled, for facts and reasons which the Court sets out in the opinion filed herewith.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling the said motion, the United States Attorney in behalf of the United States excepts.

Thereupon, on the said 9th day of April, 1915, after the court had entered the order overruling the said motion to vacate the order of the court suspending the execution of the sentence imposed upon the defendant, the United States, by its attorneys, filed

with the clerk a praecipe in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN } Praecipe

To the clerk of the above entitled court:

You will please prepare and issue forthwith an order of commitment for James J. Henahan, in accordance with the judgment of the court heretofore entered by the Honorable John M. Killits, Judge of this court, in the above entitled cause, by which judgment the defendant, James J. Henahan was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas, said order of commitment to be prepared as required by law and the rules of this court.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.

And on the same day the clerk of said court refused to comply with the foregoing praecipe requesting him to issue an order of commitment for the defendant, James J. Henahan, and handed to the United States attorney his written refusal so to do, in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES *vs* JAMES J. HENAHAN. } Refusal of clerk to issue order of commitment.

To E. S. WERTZ,
United States Attorney for the
Northern District of Ohio:

I hereby refuse to issue order of commitment for James J. Henahan in the above entitled cause, as requested by you in your praecipe filed herein, for the reason that the sentence pronounced by the Honorable John M. Killits, Judge of this court, by the terms of which the said James J. Henahan was sentenced to five years imprisonment in the penitentiary at Leavenworth, Kansas, has been suspended by the terms of the following order made in the above entitled cause:

"The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence."

B. C. MILLER,
Clerk, U. S. District Court,
By J. W. WILSON,
Deputy Clerk.

APR. 9, 1915.

On the same day, to-wit, April 9, 1915, and after the refusal by the clerk to issue said commitment in compliance with said præcipe, there was filed in this cause by the United States, through its attorneys, a motion in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN } Motion.

Now comes the United States, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the court for execution of the judgment rendered against the defendant James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of Five (5) years in the penitentiary at Leavenworth, Kansas, and for an order directing the clerk of this court to forthwith issue commitment upon the said judgment and sentence for the reasons, towit:

1. That the order of the court entered subsequently to the entry of judgment whereby the court attempted to suspend the execution of said judgment was and is illegal and void;

2. That the court has no authority or jurisdiction to enter said order of suspension;

3. That the said suspension was not for the purpose of preventing an abuse of the Court's process or to prevent an injustice being done the said defendant.

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review

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of the said judgment, and nothing requiring further action by the court making the order, was necessary, before the said judgment should become final.

5. That the clerk because of said suspension order has refused and will continue to refuse, to comply with the praecipe filed in his office in said cause on behalf of the United States calling for the issuance forthwith of said commitment.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

On said April 9, 1915, the further proceedings were had in said cause as appear by the journal of the court to-wit:

THE UNITED STATES,
vs
JAMES J. HENAHAN,
} Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, for execution of the judgment rendered against the defendant, James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas. The Court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary, before the said judgment should become final, except such as might arise under said order of suspension, and that the clerk, because of said suspension order,

has refused and will continue to refuse to comply with the praecipe filed in his office in this cause, in behalf oi the United States, calling for the issuance forthwith of said commitment, and the said motion having been argued by counsel and submitted to the court, and the court being now fully advised in the premises finds that when the order suspending the execution of the sentence of imprisonment was made there were no proceedings pending for a review of the said judgment, and there was nothing necessary requiring further action by the court making the order before the said judgment should become final, except such as might arise under said order of suspension.

The court further finds that the United States, Plaintiff, through its attorney, E. S. Wertz, has filed in the office of the Clerk of this court, a praecipe requiring said clerk to prepare and issue forthwith an order of commitment as required by law and under the rules of this court, and the court further finds that the said clerk of this court has refused, and will continue to refuse, to comply with the said praecipe filed in his office in said cause in behalf of the United States, calling for the issuance forthwith of said commitment.

The court further finds because of the findings of the court in an opinion filed herewith, that the said motion is not well taken and should be overruled.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling said motion the United States Attorney in behalf of the United States excepts.

And thereupon, and upon said 9th day of April, 1915, and in connection with the orders of the court overruling the government's motion to vacate the order of suspension of sentence herein, and overruling

the motion of the government for execution of the sentence, the court filed his written opinion, in the words following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

UNITED STATES
vs.
JAMES J. HENAHAN.

KILLITS, J.:

The district attorney, by motion, asks the court to vacate an order made at this term suspending the execution of the sentence of imprisonment imposed upon the defendant.

It is proper that the court at this time should state its reasons, first, for attempting to suspend the execution of the sentence of imprisonment, and for now refusing the motion to vacate such order.

We find that for a great many years judges of this court have exercised, without question, the discretion both to suspend the execution of sentence already imposed, or to pass a criminal case after conviction indefinitely, at the discretion of the court, for sentence. The action of the court in this case was no innovation in a well recognized practice, not only in the federal courts of Ohio, but, sustained by specific opinion of the Supreme Court of Ohio as applied to the discretionary power of the state court.

Without enlarging by reference to authority upon the right of the court to suspend the execution of sentence, we observe that there seems to be no question but that such discretion abided in common law

courts in England and America at the time of the adoption of the Federal Constitution. Our criminal practice conforms to the common law practice obtaining in 1787, so far as it has not been changed by specific statutory provisions. No attempt by Congress has been made to change the relation of the court to this proposition, as it existed when the Constitution was adopted. Some anachronisms still remain to distinguish our criminal procedure from that of the States, due to the fact that the common law of the eighteenth century still controls us. For examples, a wife may not testify, nor is a convicted man competent as a witness.

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.

It seems to the court that no person is better able to determine just what proportionate effect should be given to each of these three elements now entering into the passing of a judgment upon conviction than the judge who has observed the defendant, has given some consideration to the effect of arrest and conviction upon his character, knows his domestic and social surroundings, and the community in which his crime was committed. We have become

impressed with the thought that no discretionary power more valuable than this is held by the judge of a court of this jurisdiction, and our experience in its exercise but convinces the court of its value to society as well as to the individual who benefits by it.

Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent "an abuse of the court's process, or to prevent an injustice being done to the defendant," so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed. We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purpose for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character and habits have so strongly commended him to his friends, acquaintances and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and

that he can be saved to the good of society if nothing further is done with him. These people are law abiding citizens with as keen a desire to uphold and vindicate the law as any other citizens of the community.

All the surroundings of the defendant, including what we were able to judge of his disposition and purposes, impressed the court with the feeling that it were much better for him, as a component of society, to remain at large under the court's parole in an attempt to rehabilitate himself, than to send him into the term of imprisonment which the law provided, and which, if served, might very readily tend to diminish his usefulness to society.

If his case is to be used, as of course it may be used with the utmost propriety, as a test of the question whether a discretion of this sort abides with the court, we wish it to be understood that in the court's opinion, after a full study of all the circumstances surrounding the case, the defendant is fully worthy of the exercise of the discretion, should the court's power in the premises be sustained.

The court's judgment in this matter is supported by that of substantial citizens who recommend a pardon to the young man, with an application in that behalf pending.

The foregoing are all the proceedings had in this cause.

Thereupon came the United States of America, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and John S. Pratt, Assistant United States Attorney for the Northern District of Ohio, and presented and submitted this its bill of exceptions and prayed that the same be allowed,

signed and sealed, and made part of the record; and the said bill of exceptions having been found by the court to be in all respects full, true and correct, the same is hereby settled, allowed, signed and sealed, and made a part of the record in this cause on this 21st day of April, A. D. 1915.

JOHN M. KILLITS,
Judge.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. ———, ORIGINAL.

EX PARTE THE UNITED STATES, PETITIONER.

PETITION FOR MANDAMUS.

BRIEF ON BEHALF OF THE PETITIONER.

I.

The Court had no Power to Enter the Order Suspending Indefinitely the Execution of the Judgment.

It is admitted that there is no Federal statute conferring this power on the United States courts. The argument, therefore, must be and is that the power is inherent in all courts. The common law, however, did not know of any such power, as appears from the following correct statement in the opinion of the Supreme Court of Mississippi in *Fuller* v. *The State*, 57 Southern Rep. 806, 807:

> At common law, while a judgment remained unreversed, there were only two methods by which its execution could be stayed or prevented: First, by a reprieve, which merely

delayed the execution of the sentence; second, by a pardon, which operated as an absolute bar to its execution. The power to pardon was never claimed or exercised by the courts, and will not be further considered here. Reprieves were of three kinds: First, ex mandatio regis; second, ex arbitrio judicis; third, ex necessitate legis. The first and third kinds of reprieves have no relevancy here, and we may dismiss them from further consideration. Reprieves ex arbitrio judicis, or discretionary reprieves, were granted by the courts only in exceptional cases, to prevent abuses of their process, and to prevent irreparable injustice from being done to defendants. Some of the circumstances under which this power was exercised were as follows: "Where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the Crown to remit the sentence where it seems doubtful whether the offense is included in some general act of grace or whether it amounts to so high a crime as that charged in the indictment. The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict and entertains doubt as to the prisoner's guilt, or when a doubt arises, if the crime be not within clergy, or when, from some favorable circumstances, he intends to recommend the prisoner to mercy." 2 Hawkins, Pleas of the Crown, 657; 2 Hale, Pleas of the Crown, 412; 1 Chitty's Crim. Law, 757; Archbold's Crim. Plead. & Prac.,

206; 4 Blackstone, 394. This right of the court did not rest on any express authority or recognized principle, but stood alone on ancient usage. 2 Dyer, 205 (807).

Whether such an inherent power exists or not was mooted but not decided in *Pointer* v. *United States*, 151 U. S. 396, 419. But in *United States* v. *Wilson*, 46 Fed. 748 (C. C. District Idaho), it was held that a Federal court had no power to suspend the pronouncement of a sentence; and in *In re James Adams* (——— ———), decided by the District Court for the District of Kansas on October 29, 1914, it was specifically held that a Federal court has no power to suspend the execution of a sentence.

While there is some conflict of authority upon the point in the State courts, it is submitted that the great weight of authority and the better reasoned view is against the existence of any such inherent power in the courts. The following cases to that effect are referred to:

Fuller v. *State, supra;*
In re Webb, 89 Wis. 354;
Spencer v. *The State*, 140 So. Western (Tenn.) 597;
People v. *Barrett*, 202 Ill. 287;
People v. *Brown*, 54 Mich. 15;
People v. *Felker*, 61 Mich. 110;
Neal v. *The State*, 104 Ga. 509;
In re Flint, 25 Utah, 338;
Ex parte Peterson, 113 Pac. 729 (Ida.);
State v. *Abbott*, 70 So. Eastern, 6 (S. C.);
Ex parte Clendenning, 22 Okla. 108;

In re Strickler, 51 Kans. 700;
State v. *Boss*, 80 Iowa, 467;
Daniels v. *Persons*, 137 Ga. 826;
Ex parte Bugg, 145 So. Western, 831 (Mo. App.);
Republic of Hawaii v. *Pedro*, 11 Ha. 287;
Gray v. *The State*, 107 Ind. 177;
In re Norman Markuson, 5 N. Dak. 180;
State v. *Murphy*, 23 Nev. 390.

The following cases are generally relied upon to support the doctrine of an inherent power in the courts to suspend the execution of sentences:

People v. *The Court of Sessions*, 141 N. Y. 288;
People v. *Reilly*, 53 Mich. 260;
State v. *Addy*, 43 N. J. Law, 114;
Gehrman v. *Osborne*, 82 Atlantic, 424 (N. J. Chancellor);
Sylvester v. *The State*, 65 N. H. 193.
Ex parte Williams, 26 Fla. 310;
Commonwealth v. *Dowdican's Bail*, 115 Mass. 133;
St. Helaire, Petitioner, 101 Me. 522;
Webber v. *The State*, 58 Ohio State, 616.

An analysis of these cases, however, tends very much to weaken their effect as authorities. In the case of the *People* v. *The Court of Sessions*, *supra*, which is the case mainly relied upon, there was a statute of the State expressly authorizing courts to suspend sentences "when favorable or extenuating circumstances appear and when youths are convicted of their first offense." Moreover, the statement of the court (p. 293) as to the existence of the

power at common law is weakened by an incorrect quotation from Lord Hale, whose actual language does not bear out the decision of the court. The cases of *State* v. *Addy* and *Gehrman* v. *Osborn* in New Jersey are weakened by the limitation of the doctrine to cases only where neither the prosecuting attorney nor the defendant objects. The case of *Sylvester* v. *The State* in New Hampshire, of *Commonwealth* v. *Dowdican's Bail* in Massachusetts, and of *St. Helaire, Petitioner,* in Maine, turn upon a recognized practice confirmed by statute by which the courts in those States have power to place an indictment on file. It is clear that the law in those States depends upon some local usage. The case of *Webber* v. *The State,* in Ohio, is a *per curiam* decision without any reasoning, and the case of *Ex parte Williams,* in Florida, merely follows, without reasoning, the cases of *State* v. *Addy* and *Commonwealth* v. *Dowdican's Bail.* Many of these cases are further weakened by the fact that the decision was made in answer to an application of the defendant himself, who had agreed to the suspension, and who may very well be said on that account to have waived his rights. On principle it seems clear that no such power as this can safely be entrusted to the courts without such limitations as are invariably fixed when the matter is regulated by statute. The objections to such an inherent power are nowhere better stated than in the opinion of Chief Justice Cooley in *People* v. *Brown, supra,* and in the dissenting opinion of Judge Champlin in *People* v. *Reilly,* 53 Mich. 260.

In the former case the Chief Justice said:

> * * * they (petitioners) formally request the judge himself * * * to grasp at power not confided to him, and usurp authority in the interest of a doubly convicted offender. * * * Now it is, no doubt, competent for a criminal court, after conviction, to stay for a time its sentence; * * * but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; * * * in other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime. * * * No doubt judges have done this sometimes under the pressure of such influence as appears here, but this is no reason for asking a repetition of the wrong; it is rather a reason for being specially careful and particular not to invite it, lest by and by, it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many; and that the pressure of influence and respectability may be as properly employed with a judge to prevent sentence as many seem to think it may be with a Governor to procure a formal pardon. (27, 28.)

In the *Reilly* case, Judge Champlin said:

> * * * If the judge entertained serious doubts of his guilt, he should have recom-

> mended the Governor to pardon the respondent; and if he entertained no serious doubts of his guilt, he should have pronounced judgment instead of setting the criminal at large upon his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the "ticket-of-leave" system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years. An exercise of such power in this age would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I., when he sent Sir Walter Raleigh to the block fifteen years after his conviction.

It is true that the two cases last referred to dealt with the power of the court to postpone the imposition of sentence, but if the court has no power to postpone its imposition, *a fortiori* it has no power to suspend the execution of a sentence after it has been regularly imposed. In the case of *Neal* v. *The State*, *supra*, the Supreme Court of Georgia said:

> The power to indefinitely postpone the punishment prescribed by the law, whether exercised by suspending the imposition, or by suspending the execution, of a sentence, is the power to perpetually prevent punishment, a power which, under such provisions as are found in the constitution of this State, does not exist in the courts. The authorities draw

> a clear distinction between the suspension of a sentence and the suspension of the enforcement of a sentence; and, however they may differ as to the right of a court to indefinitely postpone its judgment in a criminal case, it is well established that it can not, after the judgment is rendered, indefinitely postpone its execution. * * * Therefore the power to indefinitely suspend its execution, either in whole or in part, would be the power to prevent the enforcement of the law and to defeat the demands of justice. * * * (514, 515.)

These considerations and arguments are peculiarly applicable to the present case. Henehan was indicted under section 5209 of the Revised Statutes, which expressly provides that on conviction the defendant "shall be imprisoned not less than five years nor more than ten." The effect, therefore, of the judge's order in the present case suspending the execution of the sentence was practically to overrule the will of Congress and to substitute his own decree for the law of the land.

II.

A Writ of Mandamus from this Court is the Proper Remedy to Correct the Action of the Lower Court.

Section 688, Revised Statutes, provides in part as follows:

> The Supreme Court shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States * * *.

The "principles and usages of law" here referred to were early defined by Chief Justice Marshall in *Ex parte Crane*, 5 Pet. 190, 192, and his views were affirmed in *Ex parte Bradley*, 7 Wall. 364, 375, 376, as follows:

> * * * The learned Chief Justice observes: "A doubt has been suggested respecting the power of the court to issue the writ. The question was not discussed at the bar, but has been considered by the judges. It is proper," he observes, "that it should be settled, and the opinion of the court announced. We have determined that the power exists." He then refers to the definition and office of the writ as known to the common law in England, and to the language of Blackstone in speaking of it, as follows: "That it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening their negligence, and obviating the denial of justice." The Chief Justice then refers to the 13th section of the judicial act, which enacts that the Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases war-

ranted by the principles and usages of law, to any courts appointed or persons holding offices under the authority of the United States. "A mandamus to an officer," he observes, "is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction."

Two of the judges dissented, and one of them, Mr. Justice Baldwin, delivered an elaborate opinion adverse to the decision, in which every objection to the jurisdiction is very forcibly stated. Since this decision the question has been regarded at rest, as will be seen from many cases in our reports, to some of which we have referred.

These views have been exemplified by a long line of decisions in this court, of which the following appear most applicable here:

United States v. *Peters*, 5 Cranch. 115;
Ex parte Bradstreet, 7 Pet. 634;
Postmaster General v. *Trigg*, 11 Pet. 173;
Life and Fire Ins. Co. v. *Wilson*, 8 Pet. 291;
Ex parte Newman, 14 Wall. 152;
Ex parte Roberts, 15 Wall. 384;
Ins. Co. v. *Comstock*, 16 Wall. 258;
Ex parte French, 100 U. S. 1;
In re Hohorst, 150 U. S. 653;
The United States, petitioner, 194 U. S. 194;
In re Winn, 213 U. S. 458;
In re Metropolitan Trust Co., 218 U. S. 312;
Ex parte Metropolitan Water Co., 220 U. S. 539.

In *in re Winn, supra,* the following statement was made:

> Authority to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by a provision in the original judiciary act, which now appears in section 688 of the Revised Statutes. A writ of mandamus issued under this provision is for the purpose of revising and correcting proceedings in a case already instituted in the courts, and is deemed a part of the appellate jurisdiction of this court, which is subject to such regulations as the Congress shall make. (465–6.)

Particular attention is called to the following cases:

In *United States* v. *Peters, supra,* a very important controversy arose between the Federal Government and the State of Pennsylvania, and a mandamus was issued by this court to the judge for the district of Pennsylvania commanding him to execute a sentence;

In *Postmaster General* v. *Trigg, supra,* the motion was for a mandamus to the United States court to order an execution to issue on a judgment entered in the case. While the motion was denied because a prima facie case of improper conduct was not made out, yet the court evidently had no doubt of its jurisdiction;

In *Life and Fire Insurance Company* v. *Wilson, supra,* a mandamus was issued to the lower court ordering it to sign a judgment;

In *Ex parte Roberts, supra,* a mandamus was issued to the Court of Claims directing it to hear and decide

a motion for a new trial and to correct its records accordingly;

In *Ex parte French, supra*, an application was made for a mandamus to direct the Circuit Court to proceed and completely execute its judgment. While the petition was denied on the merits, this court evidently entertained no doubt of its jurisdiction to issue the writ in such a case;

In *United States, petitioner, supra*, a mandamus was granted to the District Court ordering it to enter final judgment on its records in certain causes.

In the most recent case on the subject, *Ex parte Roe*, 234 U. S. 70, while the petition was finally dismissed because the order complained of was a judicial act, yet jurisdiction was assumed of a petition to mandamus the District Court of the United States to remand a cause to the State court.

In the present case, if the argument under the first heading be sound, the order suspending the execution of the sentence was entirely void, and the petitioner has no other remedy to enforce its rights. According to the contention of the petitioner, the court refused to execute its lawful judgment, and can only be compelled to do so by the mandate of this court. It is submitted, therefore, that the writ should issue as prayed.

THOMAS WATT GREGORY,
Attorney General.

JOHN W. DAVIS,
Solicitor General.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

MAY, 1915.

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